No. 48761-6-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

MICHAEL MONTGOMERY,

Plaintiff/Respondent,

vs.

DENNIS MONTGOMERY and MIA MONTGOMERY,
husband and wife,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 13-2-13036-5

BRIEF OF RESPONDENT

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I. INTRODUCTION

Dennis Montgomery engaged in a gratuitous bailment when he took control of his son Michael Montgomery's possessions after Michael[1] was sent to prison in December 2012. He retained control of those possessions until discarding them. He never received permission from Michael to discard or sell the possessions. Michael is still in prison.

Upon being sued, Dennis did not claim *consent* as a defense to his actions. He engaged in little discovery, never deposing Michael's mother, Pam Montgomery, or other important witnesses. In his interrogatory answers and during his deposition, Dennis never claimed to have received any type of consent to discard Michael's possessions.

During the first trial, the defense strategy was clearly an attempt to confuse the issues and trash Michael and Pam without regard for any real legal defense. During Pam's testimony, the issue of her being Michael's Power of Attorney came up. At that point, the defense strategy changed and, for the first time, Dennis and Mia Montgomery began to claim they discarded Michael's possessions because Pam, as Power of Attorney, had given consent. The actions of the defense were appalling and the trial court ordered a mistrial and awarded plaintiff terms. Dennis and Mia sought discretionary review, which this Court denied.

Before the second trial, the trial court granted Michael's partial summary judgment motion on liability – finding Dennis had engaged in a gratuitous bailment and was therefore responsible for the conversion of Michael's property. The case commenced to the second trial on the issue of damages alone. The jury awarded Michael $24,000.00. Where the actions of the trial

[1]First names are used for clarity purposes; no disrespect is intended.

court were supported by law and well within its discretion, this Court should affirm the jury's verdict as well as the trial court's award attorney fees and costs.

II. STATEMENT OF THE CASE

In December 2012, the plaintiff, Michael Montgomery (Michael) was facing sentencing for two convictions in Federal Court in Tacoma. CP 417-19. He was living in Aspen, Colorado. Id. He was led to believe if he was sentenced to prison, he would have a month or two to report to prison. Id.

Instead, immediately after being sentenced to five years in prison, Michael was taken into custody. CP 421. His car was still parked at the airport in Aspen and his belongings were in Aspen at his condominium and a storage unit outside of town. CP 417-19.

Michael's family attended the sentencing. CP 421-23; 425-26. His divorced parents, including his father, defendant Dennis Montgomery (Dennis) crossed Pacific Avenue to the Starbucks to discuss retrieving Michael's possessions. Id. Dennis volunteered to fly to Colorado, rent a U-Haul truck and drive Michael's possessions to Tacoma. CP 429. Dennis was calling the shots. CP 425-27. Dennis, along with Michael's father-in-law, Frank Blakely, flew to Colorado and packed Michael's possessions into a U-Haul type truck. Dennis drove the items to his house in Tacoma. CP 429.

Upon returning, the vast majority of the possessions Dennis gratuitously retrieved from Colorado were either discarded or auctioned by early February, 2013. CP 425-26, 431. In his deposition, Dennis clarified that he alone made the decision to discard Michael's possessions.

> Question: Okay. But it wasn't your decision to get rid of that stuff only. It was a collective decision?
>
> Dennis: *No. It was my decision*, but I gave Pam and Paul ample opportunity, a whole month, to get it out of my garage, and nobody did.

CP 424.

Dennis further clarified:

Question: Okay. If Michael said that it was – that you intentionally destroyed or gave away his possessions, would that be accurate?

Answer: Yes.

CP 427.

As shown, prior to trial, plaintiff deposed several witnesses, including Dennis and Mia Montgomery (Mia). Importantly, defendants declined to depose several key plaintiff witnesses, including Michael's mother, Pam Montgomery, Frank Blakely, Clark Montgomery, Paul Montgomery and Joe Lawson.[2]

Also prior to trial, plaintiff filed a trial brief outlining the applicable law as it related to bailments. CP 69-72. The trial brief also set forth facts consistent with what Dennis and Mia had stated during discovery. Id. Plaintiff also informed the court of his intent to call an expert witness - appraiser Mary Sudar to opine as to the value of his lost property. CP 44-47. Defendants did not provide their own appraiser, however, they did submit a financial statement from Michael stating on October 22, 2012 that he had $10,000 in personal assets. CP 39. Clearly there was to be a factual dispute over the *value* of Michael's property.

The defense did not file a trial brief nor did they give a forecast as to their defenses other than what was set forth in their Answer. CP 259-261. Defendants specifically never claimed any affirmative defense related to "consent" – as required under CR 8(c) – and never stated in any interrogatory or deposition answers that Pam had given consent via Mia for Dennis to discard Michael's possessions. Id. Further, there was never any evidence that Michael, the true owner of the possessions, had ever given anybody consent to sell or otherwise discard his property. Id. In fact, it remains undisputed that Michael was appreciative of his fathers' efforts in retrieving his property

[2] Defendants' only discovery deposition was of Plaintiff's appraiser, Mary Sudar. Defendants also participated in the perpetuation deposition of Plaintiff – who is/was housed at a federal detention facility in Colorado.

and upon learning Dennis had retrieved it, he desired that it be protected until his release from prison. CP 209-269.

At the first trial it appeared, at least initially, that the defense strategy was to badmouth or trash Michael and his Mom and try to make the jury feel sorry for Dennis. CP 257-260. That along with a hope that Michael's criminal history and incarceration would dissuade the jury from a favorable verdict. Id. From the plaintiff's perspective, none of that was relevant, so Michael's case was based on overcoming Dennis' deposition testimony that Michael's mother or brother were responsible because they had the whole month of January to pick things up and failed to do so. After all, it was clear that Dennis had engaged in a *gratuitous bailment* when he travelled to Colorado, retrieved his son's possessions and then took them to his house in Tacoma. Id. As such, under the law, Dennis was liable for converting the items he had sold or otherwise discarded. Id. At one point the trial court began discussing the possibility of a directed verdict unless the defense could codify a legitimate legal defense.

On the fifth day of trial, following multiple plaintiff objections that were sustained, the jury was excused. CP 209-69. The issue the trial court was dealing with surrounded the two facts previously unmentioned during discovery, pretrial or trial.[3] The first was the existence of a Power of Attorney which was signed by Michael on January 22, 2013 – giving Michael's mother, Pam Reed, authority to manage Michael's affairs, and the second was the alleged phone conversation whereby Pam told Mia to "go ahead and sell" Michael's possessions. Id. In other words, the defense was now arguing that Pam had given Mia authority – as Michael's Power of Attorney – to sell what remained of Michael's possessions. Id. From the perspective of the plaintiff, as well as the Court, this was a shocking new defense – as the alleged phone

[3]Again, defendants declined to depose all plaintiff witnesses except the appraiser and Michael (during his perpetuation deposition).

conversation whereby Pam give Mia permission to sell everything had never been disclosed despite numerous opportunities during depositions and interrogatories. Id. It was at roughly this point the Court declared the mistrial. Id. Specifically, the Court stated:

> Here's the deal, I do think that the plaintiff has been prejudiced by the way this case has proceeded. If this information had been known from the beginning, they could have prepared for it and dealt with it a different way in terms of opening, in terms of presentation of the case.

Id.

In finding misconduct and awarding terms, the trial court stated:

> I do think there has been misconduct by the defense in terms of its lack of forthrightness during discovery. I do think that, therefore, terms are justified. I don't think plaintiff gets a fair trial here even if all of this stuff was hashed out and presented in front of the jury because it was sprung as a surprise and it shouldn't have been. It was a matter of avoidance from the defense that there was an authorization from mom at least and saying that the family authorized it is a very vague way of putting it because no one else in the family authorized it. It only was done in a reported conversation with her. It is not clear that conversation even took place much less that it took place in the timeframe that the defendant is telling me.

Id.

At a subsequent hearing, the Court received briefing from Michael outlining his attorney fees and costs. CP 171-74. On September 4, 2015 the Court entered an order awarding $10,115.00 in fees and $600.00 in costs. CP 270-272. The order specifically stated that the award was based on the trial court's oral ruling granting the fees and costs on May 11, 2015. Id.

Prior to the new trial, defendants filed a motion for discretionary review arguing the trial court had erred in awarding terms. This Court declined to review the case. With the case back at

the trial court level, prior to the second trial, Michael filed for partial summary judgment, arguing that liability was clear since Dennis was a gratuitous bailee and Michael's possessions were lost while under his control. CP 405-13. Within that motion, Michael pointed out the following:

By Dennis' own admission, Pam never told him she was Michael's Power of Attorney. CP 231. Dennis allegedly learned of the existence of the Power of Attorney from a conversation with Michael's brother, Paul, sometime around January 4th or 5th, 2013 – although the document wasn't actually signed until January 22, 2013. Id. There was no evidence suggesting Dennis and Pam communicated between January 22, 2013 (the date Michael signed the POA) and the date when all of Michael's remaining possessions were auctioned (they were sent to auction on January 31, 2013). CP 209-69. During the first trial, Dennis testified that his last conversation with Pam was on January 4th or 5th. Id. Dennis never reached out to Pam – after January 22nd – and said, "as Michael's Power of Attorney, these possessions are now yours and you must retrieve them by this date." Further, Mia could not have legally communicated the alleged "consent" between January 10-24, as there was a no contact order forbidding her and Dennis from communicating during that time. Id.

It was also pointed out in the motion that there was no evidence Dennis actually viewed the Power of Attorney document before discarding Michael's property. Id. Additionally, there was no evidence that Dennis informed Pam of his intent to dispose of the possessions after January 22nd. Id. Nor was there any evidence Dennis received information from Michael suggesting Pam was his Power of Attorney. Finally, there was no evidence, ever, that Michael wished for his property to be discarded – rather it was the opposite, Michael made it very clear that he did not want Dennis to destroy, sell or otherwise discard the possessions Dennis had

gratuitously retrieved for him. Id. Despite Michael's wishes, Dennis made the decision to get rid of Michael's property. CP 424, 427.

The partial summary judgment motion was granted and the case proceeded to trial on the issue of damages only. CP 535. After hearing the evidence, the jury returned a verdict in favor of Michael for $24,000.00. CP 630-33.

III. ARGUMENT

Appellants raise two issues in their appeal. They argue the trial court erred in (1) granting the mistrial and awarding sanctions in favor of Michael, and (2) granting Michael's motion for partial summary judgment in advance of the second trial. Neither of the arguments are clearly set forth and no specific cases are analyzed or applied to the facts in this case. As such, it is respectfully requested that this Court affirm the trial court's decisions.

A. The decision to grant the mistrial and award terms was well within the trial court's discretion.

The decision to grant a mistrial and award terms is reviewed for abuse of discretion. Progressive Animal Welfare Soc. v. University of Wash., 114 Wn.2d 677, 688, 790 P.2d 604 (1990); Romero v. West Valley School District, 123 Wn.App. 385, 98 P.3d 96 (2004). A trial court abuses its discretion when "the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." Progressive Animal Welfare Soc., 114 Wn.2d at 688-89.

Petitioners argue "[s]ince pre-trial discovery was the court's focus in granting the mistrial, the laws involving discovery and sanctions should be applicable. Inadvertent oversight, if there was any, may not be willful and may not justify sanctions if there is no substantial prejudice." BOP at 16. In support of this statement, petitioners cite Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP., 110 Wn.App. 412, 40 P.3d 1206 (2002).

Review of this case reveals nothing about sanctions nor pretrial discovery or the like. This Court should, respectfully, sanction petitioners for citing to totally irrelevant case law.

Despite no citation to authority to support the above claim, even if accurate, the record clearly shows there was no "inadvertent oversight." As was shown, Dennis and Mia had multiple opportunities to claim "consent" as a defense. They did not plead it in their answer nor did they ever clearly identify Pam's alleged consent in depositions nor interrogatories. Nor did they file a trial brief explaining the defense.

Michael did file a trial brief and prepared for trial based on what information he had. He gave his opening statements and called his witnesses based on the information he had been provided. The trial court observed the filings, the opening statements and the witnesses. As shown above, at the point the defense theory changed to consent, both Michael, as well as the trial court, were shocked. The record is clear that the trial court did not find the actions of the defendants to be "inadvertent." Plaintiff's counsel, on the record, discussed the financial prejudice a mistrial without terms would cause. CP 39. The trial court used its discretion to grant the sanctions. The trial court clearly set forth its reasons for the mistrial and sanctions where it stated:

> I do think there has been misconduct by the defense in terms of its lack of forthrightness during discovery. I do think that, therefore, terms are justified. I don't think plaintiff gets a fair trial here even if all of this stuff was hashed out and presented in front of the jury because it was sprung as a surprise and it shouldn't have been. It was a matter of avoidance from the defense that there was an authorization from mom at least and saying that the family authorized it is a very vague way of putting it because no one else in the family authorized it. It only was done in a reported conversation with her. It is not clear that conversation even took place much less that it took place in the timeframe that the defendant is telling me.

CP 263-64.

Appellants have failed to show why the trial court erred in granting the mistrial and awarding terms. They have not put forth any evidence to suggest the trial court's decision was "manifestly unreasonable" or "based on untenable grounds" as required. As such, this Court should, respectfully, affirm.

B. The motion for partial summary judgment was properly granted.

A trial court's award of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

The moving party has the initial burden to prove by uncontradicted facts that there is no genuine issue of material fact. Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 598 P.2d 1358 (1979). Once the moving party has met its burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 302, 616 P.2d 1223 (1980).

A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact. Davis v. Fred's Appliance, Inc. 171 Wn.App. 348, 357, 287 P.3d 51 (2012); McCormick v. Lake Wash. Sch. Dist, 99 Wn.App. 107, 111, 992 P.2d 511 (1999). When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, the party cannot thereafter create such an issue with an affidavit that merely contradicts,

without explanation, previously given clear testimony. Klontz v. Puget Sound Power & Light Co., 90 Wn.App. 186, 192, 951 P.2d 280 (1998).

A summary judgment motion will be granted "after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion." Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).
A trial court's finding of summary judgment is reviewed *de novo*. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

As a threshold issue, this Court should reject the declarations from Dennis and Mia, made after the first trial, that are self-serving and that contradict their deposition, interrogatory and sworn trial testimony. However, even viewed in the light most favorable, none of the evidence set forth by appellants showed a genuine issue of material fact that overcame Dennis' duty to protect the bailed property. In other words, because there was no evidence defendants ever actually saw the Power of Attorney document, nor had any communication with Pam Reed between the time she became the Power of Attorney and when defendants discarded Michael's remaining property, the issue of the Power of Attorney was irrelevant and the trial court correctly found defendants liable for loss of the possessions.

As Michael argued in his motion for summary judgment, a bailment is the legal possession of personal property by one who is not its true owner. See White v. Burke, 31 Wn.2d 573, 578, 197 P.2d 1008 (1948); Chaloupka v. Cyr, 63 Wn.2d 463, 387 P.2d 740 (1963). The bailor is the person who possesses legal title to the property while the bailee is the person who takes temporary possession of the property. Id. A bailment is generally a consensual transaction where a duty of care is recognized. Collins v. Boeing Co., 4 Wn.App. 705, 710, 483 P.2d 1282 (1971).

A gratuitous bailment is a bailment for the sole benefit of the bailor. White v. Burke, supra; Peltola v. Western Workman's Public Society, 113 Wash. 283, 193 P. 691 (1920). It results when the care and custody of the bailor's property is accepted by the bailee without charge and without any expectation of receiving a benefit or consideration, directly or indirectly, for so doing. Id.

In the case of a gratuitous bailment, the bailee is liable to the bailor for the loss of the bailed property only in the event that such loss is proximately caused by the gross negligence of the bailee or an act of conversion by the bailee. Id.; see also Chaloupka v. Cyr, 63 Wn.2d 463, 387 P.2d 740 (1963)(the unexplained failure of a bailee to return bailed goods is prima facie evidence of his breach of duty); Peltola v. Western Workman's Public Society, supra; (bailee that commingled bailed money with its own funds was absolutely liable for loss).

This case clearly involved a gratuitous bailment: By his own admission, Dennis took control of the situation following Michael's incarceration and flew to Colorado to take possession of Michael's effects and transport them safely to his home in Tacoma – as he stated, he was "calling the shots." The decision to discard the property was his alone:

> Question: Okay. But it wasn't your decision to get rid of that stuff only. It was a collective decision?
>
> Dennis: *No. It was my decision*, but I gave Pam and Paul ample opportunity, a whole month, to get it out of my garage, and nobody did.

CP 424.

Again, Dennis further clarified:

> Question: Okay. If Michael said that it was – that you intentionally destroyed or gave away his possessions, would that be accurate?
>
> Answer: Yes.

CP 427.

With these admissions alone, and without evidence Michael ever retrieved the possessions, as a matter of law Dennis was presumed liable. After all, Dennis admitted auctioning Michael's possessions and keeping the proceeds from the sales – thereby "commingling" that money with his own. The burden was on Dennis to prove he was not (a) "grossly negligent" in his efforts to protect the property, and (b) that he did not convert the property (Neither Dennis nor Mia addressed these issues in their respective declarations). Where Dennis could provide no material facts to meet his burden, the trial court properly found him liable on summary judgment.

As stated above, midway through the first trial, the defense strategy changed based on the alleged "discovery" of the Power of Attorney by defense counsel as well as an alleged conversation between Mia and Pam where Pam told Mia to "go ahead and sell Mike's stuff." This was the point where the trial court ordered the mistrial.

Although lacking specifics, appellants contend that once Pam Reed became Michael's Power of Attorney on January 22nd, her previous alleged "consent" to sell the property became "legally justified" and/or that her failure to immediately retrieve the items constituted abandonment of them. Both of these arguments fail for several reasons.

First, by Dennis' own admission, Pam never told Dennis that she was Michael's Power of Attorney. CP 231. Dennis' alleged knowledge of the Power of Attorney supposedly came from Michael's brother, Paul, sometime around January 4th or 5th. Id. Of course, that could not be accurate since the document was not signed until January 22nd.

Second, there was no evidence that Dennis and Pam conversed at all between January 22nd and the date when all of Michael's remaining possessions were auctioned - they were sent to auction on January 31. In fact, at trial Dennis testified that his last conversation with Pam was on

January 4 or 5. Dennis never reached out to Pam – after January 22nd – and said, "as Michael's Power of Attorney, these possessions are now yours and you must retrieve them by this date." Where Dennis never gave Pam either notice of his intent to discard the items nor a reasonable amount of time to retrieve them - he cannot argue that they were abandoned.

Third, Mia could not have legally communicated the alleged "consent" between January 10-24, as there was a no contact order forbidding her and Dennis from communicating. If Mia told Dennis of Pam's consent to sell the possessions after January 24th, Dennis would have needed to confirm Pam was legally able to provide that consent. Where there is no evidence of that occurring, Dennis cannot argue he had legal consent to sell the remaining items.

Fourth, there is no evidence Dennis *actually viewed* the Power of Attorney document before discarding Michael's possessions. Since the document was signed on January 22, 2013, we know that some of Michael's possessions were already gone. We also know that the remaining possessions were auctioned off soon thereafter. Without evidence that he viewed the document, Dennis cannot escape his duty to protect the possessions.

Fifth, Dennis never informed Pam of his intent to dispose of the possessions *after January 22nd.* Dennis may argue that this communication was relayed earlier in the month to Mia, but that information is simply not relevant without a legal basis (a Power of Attorney) to conclude the possessions were actually Pam's responsibility.

Sixth, and most importantly, Dennis and Mia concede, on multiple occasions in their appeal to this Court that they were not aware of the existence of the Power of Attorney until the first trial in this case – long after the property was lost. See Brief of Appellants at 1, 3, 4, 6, 9, 13, 18, 21. Without knowledge of the existence of the document during the relevant time period, Dennis had a duty to protect the items as the bailee.

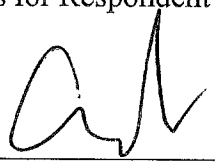
In sum, Dennis' arguments fail and the trial court did not err. Dennis was a gratuitous bailee and therefore liable for loss of the property for (a) gross negligence or (b) conversion. Where the items were lost and Dennis readily admitted in his interrogatory and deposition answers that he acted alone in discarding them, summary judgment was proper.

IV. CONCLUSION

Based on the above cited record and authorities, this Court should, respectfully, find that the trial court did not abuse its discretion in ordering a mistrial and awarding sanctions in the amount of $10,715.00 following the first trial. This Court should also find that the trial court did not err in granting Michael's motion for partial summary judgment. Further, this Court should, respectfully, affirm the jury verdict awarding Michael $24,000.00 for the loss of his property.

DATED THIS 24th day of October, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Respondent

By: 

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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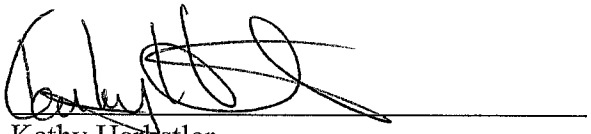

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